UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SEAN PAUL REYES,

Plaintiff,

v. 23 Civ. 6369 (JGLC)

THE CITY OF NEW YORK,

Oral Argument

Defendant.

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New York, N.Y.
August 13, 2024
10:02 a.m.

Before:

HON. JESSICA G.L. CLARKE,

District Judge

APPEARANCES

LATINOJUSTICE PRLDEF
Attorneys for Plaintiff
BY: MEENA ROLDÁN OBERDICK
ANDREW CLAUDE CASE

NEW YORK CITY LAW DEPARTMENT
Attorneys for Defendant
BY: MARK DAVID ZUCKERMAN

(Case called)

THE COURT: We are here in *Reyes v. City of New York* for an oral argument on defendant's motion to dismiss the first amended complaint.

Counsel, please state your appearances for the record starting with the plaintiff.

MS. OBERDICK: Good morning, your Honor. Meena Roldán Oberdick with LatinoJustice PRLDEF for plaintiff Sean Paul Reyes, and I'm accompanied by my colleague Andrew Case.

THE COURT: Good morning. And for the city?

MR. ZUCKERMAN: Good morning, your Honor. Mark Zuckerman for the defendant City of New York.

THE COURT: Good morning. So I'm going to first hear from counsel for defendant and then hear from counsel for plaintiff. I anticipate limiting this to about 20 minutes per side, but we'll see how things go.

So, Mr. Zuckerman, I'll start with you.

MR. ZUCKERMAN: Thank you, your Honor.

May it please the Court. My name is Mark Zuckerman, Office of the Cooperation Counsel for defendant City of New York.

As your Honor is aware, the city has moved to dismiss plaintiff's amended complaint in its entirety. Plaintiff's amended complaint contains six causes of action. Each of them should be dismissed upon the city's motion. Plaintiff first

brings a claim under the First Amendment. Plaintiff contends that he has a First Amendment interest in recording in NYPD precinct lobbies, which are open to the public.

In deciding plaintiff's application for a preliminary injunction, the Court ruled that plaintiff had not demonstrated a likelihood of success on this claim. The Court correctly applied the forum analysis as set forth in United States Supreme Court's decision in *Cornelius* and its progeny, which analyzes First Amendment activity restrictions on government properties.

NYPD precinct lobbies are nonpublic fora. This is clear from the video of the subject incident where plaintiff incorporated by reference to his amended complaint. NYPD precinct lobbies are not set up for expressive activities nor is that their intended use. NYPD precinct lobbies are set up for the NYPD business that is conducted in such locations.

Members of the public are able to file complaints and police reports. Members of the public are able to talk to police officers and detectives. Members of the public are able to obtain police reports. Domestic violence victims are able to meet with police officers and detectives. Individuals are able to discuss the possibility of becoming confidential informants.

NYPD precinct lobbies are not set up for expressive activities or for public debate. That's not their intended

use. NYPD precinct lobbies are therefore nonpublic fora.

THE COURT: Mr. Zuckerman, let me ask you about the cases that plaintiff cites that they say stand for the proposition that I should not conduct a forum analysis, and that instead, it should be based on intermediate scrutiny and that's the standard that I should apply. And I looked at one of their cases, *Price v. Garland* and the analysis there as to why a forum analysis shouldn't be conducted. What's your response? Why should I not consider the reasoning in *Price v. Garland*?

MR. ZUCKERMAN: Well, actually, I mean, *Price* applied a reasonableness test to filming in a public park I believe. So actually *Price* applied a lesser degree of heightened scrutiny, a lesser degree of scrutiny than the forum analysis.

THE COURT: I agree with you on that, but on the first part *Price* -- the Court went through the analysis of, and then determined that a forum analysis is essentially irrelevant, and then just applied the reasonableness standard. So you disagree with that first part I assume?

MR. ZUCKERMAN: Right. Because, I mean, the United States Supreme Court and the Second Circuit Court of Appeals has never applied heightened scrutiny to a right to record of any sort or information gathering. So they're just not United States Supreme Court precedent or Second Circuit precedent for that proposition. And the out-of-state circuit courts, they've

applied, most of them, have applied the forum analysis that I've gone through so far here today. And concluded that under reasonableness standard, a restriction on recording is okay. So there just isn't a precedent for what plaintiffs are contending.

The restriction that plaintiff challenges, restrictions on recording in NYPD precincts is reasonable and content neutral. It therefore passes Constitutional muster. The first important thing to note is that the restriction on recording in NYPD precinct lobbies is just one aspect of the subject NYPD policy on the recording of police activities. It was part of a settlement of a lawsuit which included a new NYPD patrol guide that allows members of the public to record police officers' activities in traditional public areas, such as streets and sidewalks as well as inside private buildings where individuals have the right to be present.

THE COURT: Was that settlement before the right to record was --

MR. ZUCKERMAN: Yes, it was. It was in the *Rubicon* case, which was 2018.

So the patrol guide provision that was promulgated as part of that preceded the Right to Record Acts by approximately two years.

So it was not a blanket restriction on the recording of police officers as they undertake their policing activities

as plaintiff contends. It is just the opposite.

The second aspect of this is that the restriction ensures that NYPD precinct lobbies are able to be used for their intended purpose, the police business that I've already described here today. Individuals who go to NYPD precincts are likely not going there with the expectation that they are going to be recorded by plaintiff. They may not want that. And that might lead to confrontations with plaintiff that the NYPD would have to referee. Individuals may want to keep their transactions private. And there are security concerns that justify this restriction as well.

Plaintiff's own subject video shows that. He video recorded a security keypad on the entry to the private area of the precinct as a police sergeant entered a security code on a keypad. He video recorded a fixed security camera in the precinct lobby. He also video recorded private areas of the precinct from the precinct lobby. The stated purpose of his recordings is to post them online. That's what he does. That presents security, privacy, and safety concerns. The NYPD policy is therefore reasonable as a matter of law.

The policy is also content neutral. The policy may be enforced against anyone recording in an NYPD precinct regardless of content. The policy does not address any particular content at all. The policy is therefore content neutral and passes Constitutional muster as a matter of law.

It does not violate the First Amendment under a forum analysis.

So plaintiff knows that the forum analysis defeats his First Amendment claim. As your Honor already referred to, he is now trying something else. Now he claims that recording an NYPD precinct is really not expressive activity, but rather should be analyzed as information gathering or recording under heightened Constitutional standards. As I've already discussed, he does not cite to any United States Supreme Court or Second Circuit decision that supports his conclusion, nor could he.

Under the Second Circuit authority, *the City of Yonkers* case, recording in courtrooms was analyzed under a reasonableness standard. The Second Circuit did not apply a heightened scrutiny standard to recording in a nonpublic forum. The Third Circuit in the *Whiteland Woods* case noted that the Second Circuit in *City of Yonkers* had evaluated the ban on recording in courtrooms using criteria similar to expressive speech in a nonpublic forum.

As we have set forth in our briefing, most out-of-circuit Court of Appeals decisions analyzing recording or information gathering did not apply a heightened scrutiny, a heightened level of scrutiny, to restrictions on recording or information gathering in nonpublic fora and did apply the forum analysis.

So there's hardly consensus, as plaintiff contends, of

out-of-circuit Court of Appeals to apply heightened scrutiny to the recording of police officers in nonpublic fora. So plaintiff's First Amendment claims should be dismissed.

Briefly, plaintiff also brings a First Amendment retaliation claim. As the Court found in deciding the preliminary injunction issue, it is required that plaintiff demonstrate a protected First Amendment interest to succeed on this claim. But as just seen, he can't. So plaintiff's First Amendment retaliation claim fails as a matter of law as well.

I'd like to now discuss the Fourth Amendment Monell claim. Plaintiff claims that his Fourth Amendment rights were violated. This claim is new. It was not brought in his original complaint. It is only brought in desperate attempt by plaintiff to convince the Court to keep jurisdiction over this case, but the claim fails for a number of reasons.

First, even if plaintiff is ultimately correct, which he isn't, that the state and city Right to Record Acts grant him the right to record in NYPD precinct lobbies, that does not amount to a Fourth Amendment violation. This isn't a situation where there's an issue of whether or not there's probable cause under the New York State Penal Code in order to determine if there's a Fourth Amendment violation or not. Plaintiff's claim is that the state and city Right to Record Acts override the New York Penal Code. So this is a pure state law --

THE COURT: Well, why is that? So your argument is

that, just say you agree that the Right to Record Act permits plaintiff to record here in police precincts, and say a person was arrested solely for recording in a police precinct after they were unlawfully told they can't record there. You're saying that that does not amount to a Fourth Amendment violation?

MR. ZUCKERMAN: Yes, correct, your Honor.

THE COURT: And why is that?

MR. ZUCKERMAN: Because the basis, the basis of plaintiff's argument is that the state and city Right to Record Acts override the Penal Code. So that's a pure state law issue. That's not a Fourth Amendment issue.

THE COURT: Well, if there's no probable cause for the officer to arrest the person, then isn't that a Fourth Amendment violation?

MR. ZUCKERMAN: Yes. But that's not what plaintiffs are arguing. They're arguing that there's a creature of state or city law that overrides the Penal Code. So that's a pure state or local law issue, not a Fourth Amendment issue.

Second, the Right to Record Acts do not grant plaintiff the right to record in NYPD precinct lobbies. We have cited law from the New York Court of Appeals that to override the common law right of proprietorship that the NYPD enjoys, there must be a clear and specific intent of the legislature to do so. That did not happen here. The Right to

Record Acts are completely silent as to where recording of law enforcement officers may take place.

Plaintiff's interpretation of the Right to Record Acts would also lead to absurd results, which New York law is clear must be avoided. Under plaintiff's interpretation of the Right to Record Acts, he could record in the private areas of police precincts, he could record in courthouses, private residences, prisons, and hospitals. That obviously was not the intent of the Right to Record Acts. There must be some limit on where plaintiff can record.

New York courts allow this Court to look at the legislative intent on where plaintiff can record. In our briefing, we have cited to numerous portions of the legislative histories behind the Right to Record Acts, which demonstrate that the purpose of the Right to Record Acts was to codify the right to record in traditional public places like streets, sidewalks, and parks.

THE COURT: Do you agree that I should only look to legislative history if the statute is ambiguous?

MR. ZUCKERMAN: No. No. What we would argue is that the location where someone can record, that the acts are only clear in the most stratospheric sense. The contours of where someone can record, the acts are completely silent on that.

THE COURT: So you're saying that part is ambiguous?

MR. ZUCKERMAN: No, we're not saying it's ambiguous.

We're saying that it's -- the contours of where a person can record is not clear.

So the right to record, the legislative histories indicate that there wasn't an intent to create a new right, just to codify a right that already existed. Plaintiff does not refute the legislative histories that we provided, nor could he. Instead, he cites to a quote from Donovan Richards that he claimed was made a part of the legislative history of the city Right to Record Act, but it wasn't. As we pointed out in our reply brief, the quote from Donovan Richards was from a newspaper article. And the *post hoc* affidavit from Jumaane Williams not referenced in the amended complaint should not change the outcome either. At the time that the city right to record was introduced, Mr. Williams stated in the record that the intent of the city Right to Record Act was not to add a new right.

So the Court should examine the legislative histories that we presented, and it's clear there was no legislative intent to grant a right to record in police precinct lobbies.

Plaintiff hasn't brought a claim against the city based upon its enforcement of the trespass laws independent of the Right to Record Acts.

In any event, as seeing there was no specific or clear intent to override the New York trespass laws or the NYPD's common law rights as proprietor. Plaintiff even concedes that

the trespass laws address this issue, even if they don't agree with the outcome of the analysis, that we believe ought to be reached.

In any event, in the circumstance, plaintiff's Constitutional rights were not violated by virtue of the enforcement of the trespass laws, because as seen in light of the intended uses of precinct lobbies and conducting a forum analysis, plaintiff's First Amendment rights were not violated, nor were statutory rights violated either because the Court should analyze this issue in light of whether plaintiff's interpretation would lead to absurd results and the legislative histories of the acts that I've already discussed. Recording in police precinct lobbies is not consistent with their intended uses.

Under any of these tests, in order for plaintiff to leave -- under any of these tests, the order for plaintiff to leave the 61st Precinct when he was recording was lawful under state common law.

Third, there was probable cause for plaintiff's subject arrest at the 61st Precinct. As seen, he did physically interfere with the official functions being conducted by the office --

THE COURT: Was that based on what is asserted in the complaint or are you looking beyond what's -- is that based on what's in the video, which is outside of the scope of what's

alleged in the complaint? And, if so, can I consider that?

MR. ZUCKERMAN: Yes, your Honor, it is based upon the video. The video, we would argue, is incorporated by reference into the complaint. And a video that's incorporated by reference into the complaint can be considered by the Court on a motion to dismiss.

THE COURT: Can you turn to -- I'm just being mindful of time.

MR. ZUCKERMAN: Yeah.

THE COURT: Can you turn to the Younger argument that you made?

MR. ZUCKERMAN: Sure. Sure.

Younger Abstention Doctrine does apply to plaintiff's newly added declaratory relief claim. Plaintiff's declaratory relief claim should be dismissed as it interferes with the ongoing criminal proceeding.

Although the prosecution arising out of plaintiff's 75th Precinct arrest was dismissed, the people have appealed the dismissal, so the criminal prosecution is still pending.

Plaintiff seeks a declaration that he can record in NYPD precinct lobbies based on Right to Record Act, which is the exact defense he has raised in the criminal proceedings. So the declaration that plaintiff seeks would interfere with the ongoing criminal proceedings.

THE COURT: But he's not seeking declaratory relief

with respect to those proceedings.

MR. ZUCKERMAN: Well, there is no other controversy of sufficient immediacy to justify declaratory relief, so he has to be targeting that criminal proceeding. There's no other way for him to bring a declaratory relief action at this juncture. And that's why the declaratory relief action or claim should be dismissed.

THE COURT: With respect to the preliminary injunction order, are you saying then that that portion of the order was wrongly decided or you're saying we're now in a different posture?

MR. ZUCKERMAN: No. I think we're in a different posture. I mean, what you have today is an ongoing -- the reason that it's different, up until that point, he had not brought a declaratory relief action. I think his original complaint said that he's specifically not bringing a declaratory relief action, and he took that language out of the amended complaint. So now that's back in play. That's the difference.

THE COURT: All right. Why don't you touch briefly on the CAPA issue and then I will hear from counsel for plaintiff.

MR. ZUCKERMAN: The jurisdiction issue or the merits?

THE COURT: Touch on both briefly.

MR. ZUCKERMAN: Sure. Plaintiff's CAPA claim presents some supplemental jurisdiction issues aside from the other

supplemental jurisdiction issues that we've raised. The city charter does not grant plenary right to seek redress for an alleged CAPA violation based on alleged rule making violations.

So plaintiff can only proceed by Article 78 of the CPLR on his claim for injunctive relief on this claim. But most federal courts have declined to exercise supplemental jurisdiction over Article 78 claims. In fact, the Second Circuit in *Carver* noted the split in district courts over whether federal courts can even exercise supplemental jurisdiction over Article 78 proceedings.

But, in any event, it would be an abuse of discretion on *Carver* for the Court to exercise supplemental jurisdiction over plaintiff's CAPA claim because it is an Article 78 claim that raises an unresolved issue of state law and implicates a significant state interest. Thus, regardless of whether the Court ultimately decides to hear the remainder of plaintiff's state and local law claims, and we contend that the Court should not exercise supplemental jurisdiction over any of the state law claims, the Court should still not exercise supplemental jurisdiction over plaintiff's CAPA claim.

Just briefly on the merits of the CAPA claim, the law we cite stands for the proposition that if the enactment leaves officers with discretion, as opposed to fixed principles, rule making is not required. Here, the policy states that officers may order an individual recording in a precinct lobby to stop

recording. If he or she does not, the officer should then order the individual to leave. If the individual does not leave, the officer may take law enforcement action against him or her.

So the officer's guidance under the policy is discretionary, and thus, no rule making pursuant to CAPA is required.

THE COURT: Thank you. All right, Ms. Oberdick.

MS. OBERDICK: Good morning, your Honor. May it please the Court. Meena Roldán Oberdick for plaintiff Sean Paul Reyes.

We ask this Court to deny the city's motion to dismiss in its entirety because it misstates binding New York Court of Appeals and Second Circuit law. It does not engage with the facts as alleged in the complaint, and it turns on factual disputes, which are not properly decided at this stage.

I would like to begin with the First Amendment claims, addressing what standard applies to the right to record police officers and why the tiered forum doctrine that applies to speech and expressive rights is not appropriate in this content. Then I'll address the city's forum doctrine arguments. I would then like to move to the Fourth Amendment addressing the probable cause arguments regarding trespass and obstruction of governmental administration. And, finally, I'll address the statutory arguments under the Right to Record Acts

and CAPA.

So beginning with the First Amendment. The First Amendment recognizes a right to record law enforcement activity. This right has been recognized and strengthened across the nation over the last 20 years as cell phone recording as become ubiquitous and transform conversations about policing and policing activity.

The first question that federal courts have confronted in deciding cases that implicate this right is what standard applies. And the majority of them have found that recording law enforcement officers is not an exercise of speech or expression in and of itself, although it is fundamental to the public's later ability to gauge -- to engage in public debate, which is speech. It is rooted in an information gathering right.

I want to address a few mis-characterizations of the binding Supreme Court cases and the Second Circuit cases that establish the contours of that right and explicitly hold that forum analysis is not applicable in this context. I'm speaking of cases such as *Branzburg v. Hayes*. I don't believe that was in the briefings. I can give the citations. That's 408 U.S. 665, 1972, and companion case, *Houchins v. KQED*, 438 U.S. 1. Both those are Supreme Court cases defining right to gather information from any source by means within the law. By definition, the right is not defined by the nature of the

forum.

Defendant also cites cases in the Second Circuit, including *Westmoreland v. CBS*. That's cited in its brief. That case actually does explicitly reject forum doctrine as applied to broadcasting news. And the Court specifically says that the forum doctrine in this context is inapposite. Likewise, *Whiteland Woods*, the Third Circuit case, also cited in defendant's brief, is an information gathering right case in I believe a City Hall. And there, too, they explicitly reject that forum analysis applies citing to the Second Circuit's case in *Yonkers* and *Westmoreland*.

So the test that these Courts apply instead is intermediate scrutiny. It sounds like intermediate scrutiny from tier forum doctrine, but it does not have a public forum predicate. The test is the following: Restrictions on the right to record police activity may be subject only to reasonable time, place, manner restrictions that are content neutral and narrowly tailored to serve a significant government interest.

We are not arguing that the city cannot implement a time, place, manner restriction on recording in its precincts or anywhere. But that's not what we have here. What we have here is an all out blanket ban that applies regardless of whether the place is held open to the public 24/7 hours of the day, or whether it is a private place, someone's private office

within a facility. It pays no attention to the place, to the time, or to the manner of recording. It doesn't care if someone is recording in a manner that might obstruct the goings on in a police precinct or whether someone is simply recording in a peaceful manner.

THE COURT: What would a narrowly tailored restriction look like here?

MS. OBERDICK: Sure. I believe there's a good example. The U.S. Capitol Police have a pretty long detailed policy about recording on U.S. Capitol grounds. And there, for example, they are largely implementing restrictions on recording for safety purposes, as well as for just preserving what goes on, the many activities that happen on capitol grounds. And their time, place, manner restrictions include prohibitions on enhancement equipment. So limitations on using tripods, for example, because it obstructs foot traffic. Limitations on the size of equipment, there's a lot of people who come through this space so we don't want commercial film crews and cameras. There's also restrictions, place restrictions. So there's specific places that members of the press or the public can stand if they're recording. Designates grassy areas for them, for example, rather than just allowing them to go willy-nilly wherever they want. So I think those are good examples.

In addition, a huge emphasis of the analysis under

time, place, manner restrictions is whether there's meaningful alternatives. Here, the complaint clearly alleges that there are no meaningful alternatives to information gathering within police precincts. We've noted as visible from the video as well that the NYPD is recording 24/7, 24/7 within its precincts, but that footage is not obtainable to the public. We allege in our complaint statistics of how often the Civilian Complaint Review Board has been able to obtain video evidence from the NYPD. And we show that 85 percent of the time, the CCRB was unable to get the video evidence it was asking for. And that was in 2020.

If the CCRB can't get video 85 percent of the time, what is the public's success rate? It's not a reasonable alternative to expect a member of the public to hire an attorney and engage in protected freedom of information litigation just to be able to show what happened to him or her in the context of the police precinct. So there are no meaningful alternatives to civilian recording in this context.

We also allege that the policy is not content neutral at paragraphs 95 and 107. Certainly we agree that on the policy's face it applies to all facilities of the NYPD without referencing the content of the recording. But as applied as we allege in the complaint, the recording ban is only applied to the public lobbies where there's an implication that the recordings will be used for accountability purposes, purposes

that have potential -- will be used to criticize the NYPD. We allege, and the Court must accept as true at this stage, a quote at paragraph 51. The NYPD bars recording in precincts to control footage of civilian/officer encounters, and not for any stated public safety purposes. We also document the long history of them targeting recording, specifically when the recording is meant for accountability purposes. So on that ground, we also think it fails this test.

THE COURT: In terms of the city's public safety reasons for the policy, it sounds like you're saying I can't take into consideration any of those because they're not stated in -- or alleged in your complaint. Is that true? Aren't there cases that say I can take into consideration sort of common sense public safety reasons in deciding this issue?

MS. OBERDICK: Certainly. We agree that you can consider the NYPD's stated interest. However, the NYPD has a burden to show that those interests are either reasonably or narrowly tailored to serving its interests. Importantly, we also think that these are -- do rely on fact questions. The extent to which its stated purposes are not pretext, as we allege, we believe that that is a factual question, and that there are assertions in the record, that if they are proven to be true, a reasonable jury could find that given the reasons for the NYPD's policy are purely pretext.

In addition, we consider not just whether the NYPD has

implemented bans. We look at the nature and the use of the forum. And as Captain Leone testified at the preliminary injunction hearing, the best evidence of what goes on in a precinct, the best evidence of how the public uses a precinct, is contained in records within the possession of the NYPD. So the question of whether those interests are served or not, by this policy, whether they're pretextual, those are fact-based questions that we cannot decide based on the conflicting evidence in the record at this stage.

Just very briefly on the city's forum analysis arguments. We believe these turn on fact disputes. As I've just said, these turn on the use and the intent of the precincts. I just quickly wanted to highlight *Askins v. DHS*. That's a Ninth Circuit case cited in our brief. That's one of the cases that does apply forum doctrine to recording on police officers at the border. And I think it's telling that the Ninth Circuit denied the government's -- the Department of Homeland Security's motion to dismiss in that case given the highly fact-based nature of determining whether their reasons are sufficient. And there, DHS's reasons were to protect border security and the integrity of its checkpoint infrastructure. If those reasons aren't enough to win a motion to dismiss at the federal level, I don't think the city's reasons are sufficient here as a matter of law.

If I may, unless your Honor has more questions on the

First Amendment, I will move to the Fourth Amendment now.

The city's Fourth Amendment arguments I understand are twofold, that it has probable cause or it had probable cause to arrest Mr. Reyes for trespass, and then separately it had arguable probable cause to arrest him for obstruction of governmental administration or OGA.

So under trespass, I understand the city's primary argument to be that it has a common law privilege as owner of its property to define who can come in and eject those who do not comply with the rules it puts in place.

Well, as a preliminary matter, whether probable cause exists, as your Honor noted, is not a question of common law privilege. It is defined by state statutes. And under the state trespass statute, the question here is whether the officer's order for Mr. Reyes to stop recording or to leave, whether that was a lawful order.

Secondly, also as a preliminary matter, there is no single common law privilege. A lot of the cases the city cites are cases in which private property owners certainly have privilege over who comes in and out of their private property, particularly homes. But even if for private property owners, there is no same privilege when you have a place of a public accommodation obviously, or if when the government, as owner, is holding a public place open to the public. The standard for when the government can eject someone under trespass for

entering and being on property that is otherwise held open to the public is governed by binding New York Court of Appeals case law that the city never mentions. *People v. Leonard*. *People v. Leonard* is the New York Court of Appeals case in which public university, SUNY Binghamton, issued a *persona non grata* letter, ejecting an individual from a part of the university campus that was otherwise open to the public.

That case directly forecloses the city's argument here. In that case, the government had argued that it did not need to put forth any evidence about the lawfulness of its ejection order, that the trial court should just assume the lawfulness given that it is the owner of this property and has a privilege. The New York Court of Appeals explicitly rejected that argument. Property held open to the public, the public has a presumed license to be on that place. So it's the government's burden, evidentiary burden, to show that the order to leave was lawful. And an order to leave will not be lawful if it is predicated on or unduly burdens a statutory or a Constitutional right.

So the city is effectively arguing exactly what is foreclosed by *Leonard*. They are asking you to apply a presumption that their order to leave was lawful because of this supposed common law privilege. That's exactly what *Leonard* says we cannot do.

Also, I just wanted to briefly address their argument

that we're asking this Court to interpret the Right to Record Acts as superseding the Penal Code. We are making no such argument. The Right to Record Acts have carve outs for obstruction of governmental administration itself. It has carve outs for breaking the law. We're not saying someone can trespass on private property or go back into an officer's private cubical beyond the place that is held open to the public. That's just not what we're arguing.

On obstruction of governmental administration quickly, first, it's not clear to us that the doctrine of arguable cause they're using to make this claim is applicable here. That doctrine usually comes up, or in my knowledge only comes up, in the qualified immunity context. Here, we are not seeking damages. We're not suing the individual officer. We are challenging an injunctive relief, the unlawfulness of a policy as a whole.

So we don't really believe the OGA arguments are relevant on that ground to begin with. But even if they are, the city has not shown the OGA elements were met in this case or in the myriad of arrests under its unlawful policy.

There are three elements that would need to be in dispute for this claim to hold. The first is there needs to be a physical interference. The second is there needs to be an intent to obstruct officers from carrying out their duties. And then, third, that intent has to be targeted at a specific

law enforcement operation. The cases we cite in our brief make very clear that mere words, asking a question, is not enough to rise to the level of physical interference. The majority of the cases we see here involve some conduct. The accused getting in the way of law enforcement, physically, standing in between a police officer and an individual accused of a crime, or interjecting and constantly interrupting the officer as he's questioning someone else. Here we don't have anything like that. We have purely passive conduct of Mr. Reyes waiting in line to get a complaint form in the public window of a lobby, not speaking to anyone else, a very low voice, really just does not rise to the level of physical interference.

Secondly, on intent, the city is asking this Court to make a fact determination about Mr. Reyes' state of mind, which it cannot do at this stage. There's simply no way to read the first amended complaint as alleging Mr. Reyes had an intent to impede officers from carrying out their duties. Quite the opposite. He made expressly clear to them that he wanted them to just hand him a complaint form and then he would be on his way. So he wanted them to carry out their duties; not the opposite.

And, lastly, as Judge August found in the Brooklyn criminal proceedings related to the 75th Precinct arrest, the city did not allege what specific law enforcement activity Mr. Reyes allegedly was trying to interfere with. Again, there

was just passive conduct. Typically, in other cases, there has to be an intent to try to impede or interfere with a specific enforcement action. For instance, someone's girlfriend is getting arrested and they're trying to impede in that. Or a buy and bust operation where a young boy was trying to warn people subject to that buy and bust operation that the police are coming. Here we have nothing of that sort. So the OGA arguments also are without basis.

THE COURT: Why don't you turn to the state right and city right to record portions of their motion. Can you respond to their argument that interpreting those laws in the way that you suggest would result in absurd results, specifically with respect to recording in state courthouses and in private homes.

MS. OBERDICK: Certainly. So the Right to Record Acts are passed after binding cases like *People v. Leonard* and the number of federal circuit court cases that we cite in our brief that define the contours of how the Court is supposed to approach these heavily fact-based questions and balance interest here. So the courthouse is a good example. The Second Circuit has actually directly decided the question of deciding in courthouses. That's in 1984. That's the *Westmoreland v. CBS* case. And in that case, after rejecting that forum doctrine applies, the Court engaged in the test that we are asking for. Essentially a time, place, manner restriction test. And there, the Court found that the public's

interest and information gathering is already adequately represented by the alternative mechanisms we have in place. We have stenographers and court reporters documenting every single word that is said in the courtroom, and those transcripts are publicly available to anyone and everyone. We have -- because pictures are worth a thousand words -- we also allow people to enter with sketch pads and professionals frequently do make drawings of the parties and the judges in a litigation proceeding.

So the Court found that those, in this context, were adequately representative of the public's interest here. And as I mentioned before, we just don't have those same types of alternative methods in place in the precinct. Conversely, the Court weighed the government's interest in regulating broadcasting in courtrooms and it found that those interests were sufficient and significant. As of 1984, it found that the Judge's interest in maintaining decorum in the courtroom, protecting jurors from being unduly influenced, it has a long paragraph at the very end of that case where it lists out the many, many significant interests that judges have. So it's a fact-based test. And our response to the city's argument about this parade of horribles is that we apply this balancing test. *People v. Leonard*, also, it defines the contours of when a government has a right to eject someone for trespass. That is the barriers that we have in place.

And when it comes to recording in a private home, certainly the NYPD is not arguing that it has a privilege to ban homeowners from recording law enforcement when they come to the door. Certainly, if you have a right to be in your home or right to be in your friend's home, you may record the police when they come and engage in activity. But that doesn't give you a right to break the law and trespass into someone else's home, which you do not know and you have no privilege to enter that place.

So we believe that there really is no parade of horribles and that the plain meaning text and intent of the legislature should hold as this Court found in its preliminary injunction motion.

I'm sorry. Go ahead.

THE COURT: Can you address next your response to the city's argument with respect to Younger?

MS. OBERDICK: Sure. I'd like to repeat the same arguments we made at the preliminary injunction stage, which is that any decision by this Court is merely persuasive, not binding on a state criminal court. You know, Judge August in the Brooklyn Criminal Court already issued a decision. She engaged independently with the facts and the law before her. She developed the record. There is absolutely no indication that she was either influenced by this Court or felt compelled to be bound by this Court. There's simply no argument that

that calculus would be different if the city were to appeal. Currently where we stand, we understand the city has notice and intent to appeal, but has not yet done so. We don't believe that there's any reason that an appeal would be different from the underlying trial court's decision.

THE COURT: All right. In terms of CAPA, are you purporting to bring the CAPA claim via Article 78 or is it -- under what method are you bringing this claim?

MS. OBERDICK: Sure. We do not bring this claim via Article 78. The city cites to several cases in which those claims were brought via Article 78. Not one of those cases establishes that Article 78 is the sole mechanism for bringing these claims. We cite to at least one case where a CAPA claim survived the summary judgment phase in the Southern District of New York. That's *New Jersey Limousine Association v. Lusk*, 1991 WL 143710. We cite I think a few other cases in S.D.N.Y. So no, we are not arguing this is an Article 78 case, nor that it is the only mechanism for bringing this claim.

THE COURT: In that case, in Lusk, did the Court specifically address whether there's a private right of action under CAPA?

MS. OBERDICK: It did not explicitly. All it found is that the opposing party did not meet its burden for the purposes of summary judgment and the claims survived. But I do not know if it was directly briefed or argued.

THE COURT: All right. So why should I exercise supplemental jurisdiction over this claim?

MS. OBERDICK: Over the CAPA claim. Well, firstly, we do believe we have strong federal Constitutional claims and there is a clear nucleus, shared nucleus, of operative facts. So for the prudential reasons of efficiency, it makes sense to hear those claims together.

You know, in the circumstance where no federal claim were to go forward at all, we're just looking at the CAPA claim, we would still think that it would not be an abuse of discretion to keep the claim given that there's a live preliminary injunction over the state law claim given that we have had this case here in this Court for quite sometime now, have started discovery. However, we would also recognize that in the circumstance where there is no federal claim, the common practice would be to send any remaining claims to state court.

THE COURT: Okay. Thank you, Ms. Oberdick.

MS. OBERDICK: Thank you, your Honor.

THE COURT: All right. Well, thank you all for your arguments. This was incredibly helpful. I anticipate making a decision soon.

And is there anything else for us to discuss with respect to this case, Ms. Oberdick?

MS. OBERDICK: No, not at this time.

THE COURT: Mr. Zuckerman?

MR. ZUCKERMAN: No, your Honor.

THE COURT: Thank you all again for excellent argument, and we are adjourned.

(Adjourned)